Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 March 2011

Public Authority: **Foreign and Commonwealth Office**
Address: **King Charles Street**
London
SW1A 2AH

Summary

The complainant submitted a request to the public authority for a copy of a document catalogued at the National Archives under the title 'Policy regarding future of Sovereign Base Areas in Cyprus' but retained by the public authority. The public authority withheld the information on the basis of the exemptions at sections 27(1)(a). It also relied on sections 23(5) and 24(2) to refuse to confirm or deny whether any of the information falling within the scope of the request was also exempt from disclosure on the basis of sections 23(1) and 24(1). The Commissioner concluded that the withheld information is exempt from disclosure on the basis of sections 27(1)(a). The Commissioner has also concluded that sections 23(5) and 24(2) have been correctly relied upon as a basis upon which to refuse to confirm or deny whether the requested information is also exempt from disclosure on the basis of sections 23(1) or 24(1).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 30 August 2009 requested a copy of a document relating to the United Kingdom's Sovereign Base Areas in Cyprus. The relevant document is catalogued at the National Archives but retained by the public authority.

3. The document is referenced FCO 9/2392 under the title, 'Policy regarding future of Sovereign Base Areas in Cyprus'.

4. On 23 September 2009 issued a refusal notice.

5. On 25 September 2009 the complainant requested a review of the public authority's decision.

6. On 8 February 2010 the public authority informed him of the outcome of the internal review. The public authority clarified that the information in the file was withheld on the basis of section 27(1). The public authority further clarified that it could neither confirm nor deny whether any of the information relating to the request is exempt from disclosure under sections 23(1) and 24(1).

7. The Commissioner notes that there were mistakes by the public authority in the initial handling of the request and he has commented on this further in the confidential annex.

The Investigation

Scope of the case

8. The complainant initially contacted the Commissioner on 12 February 2010 to complain about the public authority's handling of his request. However, because he did not provide sufficient documents in support of the complaint, it was not accepted by the Commissioner until 13 March 2010.

9. The complainant specifically asked the Commissioner to review the public authority's decision not to disclose the information in file 9/2392.

10. The complainant had also requested similar information from the Cabinet Office and the Ministry of Defence (MOD) in relation to Sovereign Base Areas in Cyprus. The MOD and the Cabinet Office also refused to disclose the information requested and he appealed their decisions to the Commissioner. In its discussions with the Commissioner's representative, the Cabinet Office requested that the Commissioner consider its submissions when reaching his decision in respect of the other complaints against the public authority and the MOD. The public authority also confirmed to the Commissioner on 10 March 2011 that it was content for the Commissioner to reach a decision on the merits of this complaint on the basis of the submissions provided by the Cabinet Office. Therefore, although the remainder of this Notice suggests that submissions had been provided by the public

authority, they would have been in fact provided by the Cabinet Office on its behalf.

Chronology

11. On 19 July 2010 the Commissioner wrote to the public authority. He requested copies of the information withheld and detailed representations on the application of the exemptions relied on.

12. On 16 September 2010 the public authority responded. The public authority made representations on the application of exemptions at sections 27, 23(5), and 24(2). The public authority however informed the Commissioner that given the sensitivity of the subject matter and the information under consideration, it was not prepared to supply the Commissioner with copies of the withheld information.

13. On 25 January 2011 the Commissioner wrote to the public authority in response to the letter above. The Commissioner sought additional clarification on the application of exemptions, particularly the exemptions at sections 23(5) and 24(2).

14. On 25 February 2011 the Deputy Commissioner and Director of Freedom of Information met with representatives of the public authority in London to discuss the case and consider the nature and content of the withheld information and the implications of disclosure.

15. On 4 March 2011 the public authority provided the Commissioner with a sample of the withheld information and clarification on certain issues that had been requested by the Deputy Commissioner. The public authority also confirmed that it had relied specifically on the exemption at section 27(1)(a).

Analysis

Exemptions

16. The full text of the statutory provisions referred to below can be found in the legal annex to this Notice.

Section 27(1)(a)

17. Information is exempt from disclosure under section 27(1)(a) if its disclosure under the Act would or would be likely to prejudice relations between the United Kingdom and any other State.

18. Following the discussions with the public authority and having seen a sample of the withheld information, the Commissioner accepts that section 27(1)(a) is engaged The withheld information relates to an issue which continues to be sensitive in the international context. Specifically it includes a frank assessment of the position of a number of other States as it was perceived at the time and speculation as to possible future policies which might be pursued.

19. The Commissioner finds that the harm anticipated in the event of disclosure is real and substantial and is satisfied in the circumstances of this case that the higher threshold of prejudice (i.e. prejudice 'would' occur) is met.

20. The Commissioner therefore finds that section 27(1)(a) was correctly engaged by the public authority. The exemptions at section 27 are qualified so the Commissioner also considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

21. The public authority acknowledged that the disclosure of the withheld information would add to the understanding and knowledge of the situation in Cyprus.

22. The public authority also recognised the public interest in a greater understanding of the United Kingdom's foreign relations.

23. The public authority also noted that the information would assist the public in gaining a better historical understanding of the United Kingdom's conduct overseas.

Public interest arguments in favour of maintaining the exemption

24. The public authority argued that disclosing the information would compromise the effective conduct of the United Kingdom's international relations. It explained that the trust within which the confidential exchanges between the United Kingdom and other governments takes place could be damaged if the information was disclosed. According to the public authority, the discussions in 1970 set the framework for the ongoing status of the Sovereign Base Areas (SBAs). Their status, and possible use, was sensitive at the time and remains sensitive to this day. Given the continued division of the island, which requires a continuing role for the United Nations, the status of the SBAs remains an important regional issue.

25. Disclosure would therefore not only compromise the effective conduct of the United Kingdom's international relations, it would also compromise the United Kingdom's ability to protect and promote its interests abroad.

Balance of the public interest arguments

26. The Commissioner agrees with the public authority that there is a clear and valid public interest in the disclosure of information concerning the status of SBAs, especially where the information in question would improve the public's understanding and inform public debate. In the particular circumstances of this case the Commissioner accepts that the complainant (and others) have a genuine interest in the matters which are at the heart of the request and furthermore that there is a legitimate public interest in disclosure of information in order to inform the public about historic events having a bearing on international relations and the United Kingdom's conduct overseas.

27. However, the Commissioner considers that there is a powerful public interest in maintaining relations between the United Kingdom and other countries especially in protection of the United Kingdom's interests abroad. In the particular circumstances of this case, as the Commissioner has concluded that prejudice would occur, not simply be likely to occur, further weight is given to the arguments in favour of maintaining the exemption. He accepts the public authority's arguments against disclosure in view of the significant harm that would occur to the effective conduct of the United Kingdom's international relations and its ability to protect its interests abroad as a result of disclosure. For these reasons the Commissioner has concluded that the public interest in maintaining the exemption contained at section 27(1)(a) outweighs the public interest in disclosing the information.

28. The Commissioner recognises that the brevity of his reasoning in relation to why he has reached this conclusion, both in terms of engaging the exemptions and the public interest test, may prove to be frustrating to the complainant. However, the Commissioner believes that any more detailed explanation of his reasoning in this notice risks revealing the content of the requested information itself.

29. In light of this conclusion, the Commissioner has not considered whether the requested information is also exempt from disclosure on the basis of section 27(2) of the Act.

Sections 23(5) and 24(2)

30. In addition to relying on the exemptions discussed above to withhold the requested information, the public authority also relied on sections 23(5) and 24(2) to refuse to confirm or deny whether any of the

information falling within the scope of the request was also exempt from disclosure on the basis of sections 23(1) and 24(1).

31. Section 23(1) and (5) state that:

> '(1) Information held by a public authority is exempt information if it was directly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)…
>
> '…(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

32. Sections 24(1) and (2) state that:

> '(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.
>
> (2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.'

33. Section 23 and 24 are obviously closely linked provisions and, as the above quotes suggest, are mutually exclusive. That is to say if information is exempt from disclosure on the basis of the exemption contained at section 23, it cannot also be exempt under section 24.

34. However, in respect of the application of sections 23(5) and 24(2), i.e. when a public authority believes it is exempt from the duty contained at section 1(1)(a), it is accepted practice to rely on both provisions when responding to a request without specifically stating which of the two actually applies. Such an approach is calculated to avoid disclosure of the fact that a section 23 body is or isn't involved in the scenario described in a particular request and was approved by the Information Tribunal in *Baker v Information Commissioner and the Cabinet Office* (EA/2006/0045). Obviously for such an approach to be effective, public authorities have to consistently cite both exemptions when responding to any similar requests.

35. Furthermore, in terms of how the Act operates, the Commissioner accepts that it is technically permissible for a public authority to say that requested information is held – and provide it or withhold it under another exemption – but at the same time rely on sections 23(5) and 24(2).

36. At the meeting with the public authority on 25 February 2011 the Deputy Commissioner was provided with a detailed explanation to support its decision to cite both sections 23(5) and 24(2) as a basis to refuse to confirm or deny whether any of the requested information was also exempt from disclosure on the basis of sections 23(1) and 24(1). On the basis of this explanation the Commissioner is fully satisfied that the public authority is entitled to rely upon sections 23(5) or 24(2).

37. Once again, the Commissioner recognises that the brevity of his reasoning in respect of this part of his decision may prove to be frustrating to the complainant. However, in cases of this nature where sections 23(5) and 24(2) have been relied upon the Commissioner believes that this is an inevitable consequence of the required approach.

38. Furthermore, in setting out his conclusion in this way, the Commissioner wishes to emphasise that it should not be inferred that one exemption is more likely to have been relied upon than another. Nor should any inference be made as to whether the public authority actually holds any information falling within the scope of the request which is in fact exempt from disclosure on the basis of sections 23(1) or 24(1).

Procedural Requirements

39. Section 10(1) of the Act requires public authorities to respond to a request promptly and in any event not later than the twentieth working day following the date of receipt

40. Section 17(1)(b) requires that if a public authority wishes to rely on exemption(s) to refuse a request it must provide the applicant with a valid refusal notice specifying the exemption(s) in question within the time period set out in section 10(1).

41. The Commissioner therefore finds the public authority in breach of sections 10(1) and 17(1)(b) for not informing the complainant within the statutory time period that it was relying specifically on the exemption at section 27(1)(a).

The Decision

42. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The information requested by the complainant is exempt from disclosure on the basis of section 27(1)(a) and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- The public authority is entitled to rely on sections 23(5) and 24(2) as a basis to refuse to confirm or deny whether any of the information falling within the scope of the request was also exempt from disclosure on the basis of sections 23(1) and 24(1).

43. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached section 17(1)(b) of the Act by failing to issue a valid refusal notice within the time period required by section 10(1) of the Act.

Steps Required

44. The Commissioner requires no steps to be taken.

Other matters

45. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

46. Part VI of the section 45 Code of Practice (the "section 45 code") makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complainant. As he has made clear in his '*Good Practice Guidance No* 5' published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that, despite the

publication of his guidance on this matter, it took the public authority over 40 working days to complete its internal review in this case.

Right of Appeal

47. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

48. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 21st day of March 2011

Signed ……

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) section 21

(b) section 23

(c) section 32

(d) section 34

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords

(f) in section 40 –

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(iii) section 41, and

(iv) section 44"

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(g) states that fact,

(h) specifies the exemption in question, and

(i) states (if that would not otherwise be apparent) why the exemption applies."

Information supplied by or relating to, bodies dealing with security matters

Section 23(1) provides that –

"Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

Section 23(2) provides that –

"A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact."

Section 23(3) provides that –

"The bodies referred to in subsections (1) and (2) are-

(j) the Security Service,

(k) the Secret Intelligence Service,

(l) the Government Communications Headquarters,

(m) the special forces,

(n) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,

(o) the Tribunal established under section 7 of the Interception of Communications Act 1985,

(p) the Tribunal established under section 5 of the Security Service Act 1989,

(q) the Tribunal established under section 9 of the Intelligence Services Act 1994,

(r) the Security Vetting Appeals Panel,

(s) the Security Commission,

(t) the National Criminal Intelligence Service, and

(u) the Service Authority for the National Criminal Intelligence Service."

Section 23(4) provides that –

"In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions."

Section 23(5) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

National Security

Section 24(1) provides that –

"Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."

Section 24(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security."

Section 24(3) provides that –

"A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact."

Section 24(4) provides that –

"A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect."

Defence

Section 26(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(v) the defence of the British Islands or of any colony, or

(w) the capability, effectiveness or security of any relevant forces."

International Relations

Section 27(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(x) relations between the United Kingdom and any other State,

(y) relations between the United Kingdom and any international organisation or international court,

(z) the interests of the United Kingdom abroad, or

(aa) the promotion or protection by the United Kingdom of its interests abroad."

Section 27(2) provides that –

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

Section 27(3) provides that –

"For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held."

Section 27(4) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

(bb) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(cc) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

Section 27(5) provides that –

"In this section-

"international court" means any international court which is not an international organisation and which is established-

(dd) by a resolution of an international organisation of which the United Kingdom is a member, or

(ee) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom."